No. 98-1037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE SMITH, Warden,

Petitioner,

vs.

LEE ROBBINS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

BILL LOCKYER
Attorney General
of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General

CAROL FREDERICK JORSTAD
Deputy Attorney General
Counsel of Record

300 South Spring Street
Los Angeles, California 90013
(213) 897-2277

Counsel for Petitioner

PETITION FOR CERTIORARI FILED DECEMBER 17, 1998
CERTIORARI GRANTED MARCH 8, 1999

QUESTIONS PRESENTED

In *Anders v. California*, 386 U.S. 738 (1967), this Court held that an indigent criminal appellant could not be denied representation on appeal based on appointed counsel's bare assertion that there was no merit to the appeal. In California, approximately 20 percent of criminal appeals result in the filing of no-merit briefs on behalf of indigent appellants.

1. Did the Ninth Circuit err in finding that California's no-merit brief procedure -- in which appellate counsel who has found no nonfrivolous issues remains available to brief any issues the appellate court might identify -- violated the Sixth and Fourteenth Amendment *Anders* right to due process, equal protection and effective assistance of counsel on appeal?

2. Did the Ninth Circuit err when it ruled that the asserted *Anders* violation required a new appeal, without testing the claimed Sixth Amendment error under *Strickland v. Washington*, 466 U.S. 668 (1984)?

3. Did the Ninth Circuit violate the rule announced in *Teague v. Lane*, 489 U.S. 288 (1989), which prohibits the retroactive application of a new rule on collateral review, when it invalidated California's well-settled, good-faith interpretation of federal law?

TABLE OF CONTENTS

TABLE OF CONTENTS, CONT'D

TABLE OF CONTENTS, CONT'D

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, CONT'D

TABLE OF AUTHORITIES, CONT'D

TABLE OF AUTHORITIES, CONT'D

TABLE OF AUTHORITIES, CONT'D

TABLE OF AUTHORITIES, CONT'D

Statutes

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998
No. 98-1037

GEORGE SMITH, Warden, *Petitioner*,

v.

LEE ROBBINS, *Respondent*.

OPINIONS BELOW

The decisions previously filed in this case are reproduced in the joint appendix (J.A.) filed under separate cover. The amended opinion of the United States Court of Appeals appears at J.A. 75-94 and is reported at 152 F.3d 1062 (CA9 1998). The original opinion appears at J.A. 57-74 and is reported at 125 F.3d 831 (CA9 1997).

The unreported opinion of the United States District Court appears at J.A. 44-53. The California Supreme Court's unreported denial orders appear at J.A. 40-42. The California Court of Appeal's unreported affirmance of Robbins's conviction appears at J.A. 38-39.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued an amended opinion on August 13, 1998, and denied the Warden's petition for rehearing on September 24, 1998. The Warden's petition for writ of certiorari was filed on December 17, 1998, within 90 days

of the denial order, and granted on March 8, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On December 31, 1988, respondent Lee Robbins shot and killed his former roommate in California. When he became the focus of the police investigation, Robbins fled

in a stolen truck. He was later arrested in Arkansas and the truck was recovered in Arizona. J.A. 28, 32, 290.

Against all advice, Robbins waived his Sixth Amendment right to counsel and represented himself at trial. J.A. 198-203, 217-27, 230-35. Admittedly unschooled in the law, he committed many blunders, most notably by failing to make trial objections that would have preserved issues for post-trial review. A Los Angeles jury found Robbins guilty of second degree murder with personal firearm use and grand theft of an automobile. J.A. 38. On September 5, 1990, he was sentenced to state prison for 17 years to life. J.A. 28, 39.

Faced with the record Robbins had failed to make in the trial court, his appointed appellate attorney was unable to find any nonfrivolous issues to raise on direct review. J.A. 35. As a consequence, counsel filed a no-merit brief in compliance with *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (Cal. 1979), California's interpretation of this Court's decision in *Anders v. California*, 386 U.S. 738 (1967). In that brief, counsel set forth the procedural history and a statement of the facts, with citations to the record. J.A. 26-37. Robbins's attorney asked the State Court of Appeal to make an independent review of the record for arguable issues, as required by *Wende*. J.A. 35. In an attached declaration, appellate counsel averred that he had spoken to the attorney who had represented Robbins until Robbins waived counsel and asserted his right to represent himself. He had also written to Robbins, informing the latter of his right to seek counsel's removal and to file a supplemental brief in propria persona. Counsel also declared that he remained available to brief any issues the state appellate court might identify. J.A. 36. Robbins then personally filed a supplemental brief, claiming insufficient evidence to support the conviction and denial of due process based on the prosecutor's suppression of exculpatory evidence. J.A. 39.

On December 12, 1991, after independently examining the record, the appellate court found that counsel had "fully complied with his responsibilities," that the claims in Robbins's supplemental propria persona brief "found no support in the record," and that no arguable issues existed. It affirmed the judgment. J.A. 39, citing *Wende*, 25 Cal. 3d at 441.

Robbins's petition for review (No. S02883) and two petitions for writs of habeas corpus (Nos. S033312 and S036062) were denied by the California Supreme Court. J.A. 40-42.

On February 24, 1994, Robbins filed a federal petition for writ of habeas corpus, alleging ineffective assistance of appellate counsel for filing a no-merit brief when there were nonfrivolous issues to be raised. J.A. 1. In response to the district court's order, the Warden filed a return, and Robbins filed a traverse. J.A. 2, 4, 5.

On September 8, 1994, the court appointed counsel to represent Robbins and ordered the parties to file supplemental briefing. J.A. 5. On October 24, 1995, the federal district court conditionally granted Robbins's federal habeas corpus petition, finding two arguable issues and ineffective performance by state appellate counsel on grounds of non-compliance with *Anders*. J.A. 10, 45-47, 53. The court ordered Robbins discharged from custody unless the California Court of Appeal accepted renewed jurisdiction over Robbins's direct appeal within 30 days. J.A. 10, 53. Both the Warden and Robbins filed notices of appeal. J.A. 11, 13.

In a published decision filed September 23, 1997, the Ninth Circuit affirmed the district court, finding a "very low threshold" for arguments appellate counsel is obliged to make under *Anders*. The Ninth Circuit held that state appellate counsel, whose brief complied with California's *Wende* procedure, had not met the requirements of *Anders*, because he failed to bring to the state court's attention two "arguably non-frivolous" issues: (1) Robbins's

right to advisory counsel and/or to withdraw his waiver of primary counsel; and (2) the adequacy of the law library. *Robbins v. Smith*, 125 F.3d 831; J.A. 67-68. The Warden sought rehearing, urging *inter alia* that the panel's decision had not merely lowered the threshold for arguments counsel must brief under *Anders*, but had effectively removed that threshold by forcing state appellate counsel to brief issues they believed to be clearly frivolous, merely to avoid being presumed incompetent. J.A. 22; P.R. 5.[1] The Warden also contended that the panel's novel requirement that all "arguably nonfrivolous" issues be raised on appeal violated the "new-rule" proscription of this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). P.R. 5.

Nearly a year later, on August 13, 1998, the Ninth Circuit issued an amended opinion. J.A. 75-94. The court responded to the Warden's arguments by dropping its formulation that all "arguably nonfrivolous" issues must be raised on appeal. Instead, the court held that counsel was required to raise all "arguable" issues. J.A. 87-88. The court found the same two arguable issues it had found before. J.A. 89. The court also found that state appellate counsel had failed to bring to the court's attention "anything in the record that might arguably support the appeal." J.A. 88; *Robbins v. Smith*, 152 F.3d 1062. It affirmed the district court's decision invalidating California's no-merit brief procedure but remanded to permit the lower court to consider whether the alleged constitutional trial errors warranted reversal of the underlying conviction, rather than merely a new appeal. J.A. 94.

When the Ninth Circuit denied the Warden's petition for rehearing and rejected the suggestion for rehearing en banc, the Warden filed a timely petition for writ of

---

1. "P.R." refers to the petition for rehearing filed in the Ninth Circuit.

certiorari. J.A. 25. This Court granted certiorari on March 8, 1999.

SUMMARY OF ARGUMENT

Robbins contended below that he was denied effective assistance of state appellate counsel by virtue of counsel's filing a no-merit brief, even though the brief complied with the California Supreme Court's earlier interpretation of this Court's decision in *Anders v. California*. The Ninth Circuit panel agreed, effectively demolishing California's decades-old *Wende* brief procedure in the process. The panel's decision was fundamentally wrong for three independent reasons.

A. The *Wende* Procedure Meets the Requirements of the Sixth and Fourteenth Amendments

First, California's procedure meets the essential goals of *Anders* by guaranteeing indigent criminal appellants the right to counsel, equal protection and due process. The state supreme court that decided *Wende* in 1979 was just as sensitive and committed to vindicating the rights of criminal defendants -- and just as capable of understanding and applying the constitutional principles announced in *Anders* -- as the Ninth Circuit panel. In *Wende*, the California Supreme Court consciously acted to expand the *Anders* guarantees so that indigent appellants would receive more extensive and effective representation in the state system than the federal Constitution required. To accomplish this end, the court permitted counsel to file a brief protecting the client's rights to a vigorous advocate by (1) allowing counsel to file a brief with detailed citations to the record, without requiring that counsel argue against his client by listing the issues he had rejected, (2) specifying that counsel would remain available during the pendency of the direct appeal, and (3) mandating the state court of appeal to conduct an independent search of the record of arguable issues.

In the years that followed, California established the appellate "projects," an elaborate mechanism designed to ensure that indigent criminal appellants receive competent and vigorous representation. Under that system, counsel are assigned work on the basis of their level of skill, and their work is overseen, assisted and reviewed as necessary by the expert lawyers who serve as appellate project supervisors. The procedure requires that a supervisor perform an intake review of all incoming cases to evaluate them for difficulty, identify possible issues and assign each case to appropriately skilled counsel for handling. When the panel attorney cannot find any nonfrivolous issues to assert and recommends the filing of a no-merit brief, the supervising staff attorney reviews the record and must concur before a no-merit brief is filed.

California's process satisfies equal protection concerns by giving an indigent appellant with a no-merit appeal a minimum of three independent reviews -- those of his panel attorney, the appellate project staff attorney, and the court. In contrast, an appellant whose retained counsel files a merits brief ordinarily has only one independent review -- his attorney's.

Wende meets the goal of providing due process, because the procedure gives indigent appellants at least two advocacy reviews of the record before a no-merit brief is filed. In this way, the appellate projects protect the rights of indigent appellants by providing multiple safeguards in the assignment, oversight and review of these cases.

Impoverished appellants with no-merits briefs also receive an independent review by the court. Moreover, counsel's citations to the record in the statement of the case and of the facts in the *Wende* brief assist the court to determine that counsel has done his duty to search the record diligently and thoroughly, and the court's independent review provides judicial insurance that counsel's conclusion was correct. Finally, the state's

procedure delivers all of the constitutional promises of *Anders* without forcing counsel to argue against the client. California's indigents are treated more than equitably by the state's courts.

The Ninth Circuit also erred in reading *Anders v. California* as if this Court had legislated a code of appellate procedure, imposing a rigid and inflexible formula for the handling of no-merit appeals on the states. In so doing, the court lost sight of this Court's admonition that *Anders* was not "an independent constitutional command that all lawyers, in all proceedings, must follow these particular procedures. Rather, *Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel." *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987). In Robbins's case, where there were no nonfrivolous issues for counsel to raise on appeal, the federal reviewing court needlessly invalidated California's decades-old no-merit procedure, which meets and exceeds the *Anders* mandate to safeguard the constitutional rights of indigent appellants.

B. Robbins Was Not Denied Counsel on Appeal

The Ninth Circuit's second error was to treat Robbins, who was at all times represented by counsel on appeal, as if he had been denied counsel, improperly finding the filing of a no-merit brief to be prejudicial per se, rather than requiring Robbins to show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). California's procedure is undeniably different from *Gideon v. Wainwright*, 372 U.S. 335 (1963), where this Court held the total denial of counsel per se prejudicial. Under *Wende*, counsel remains on the case, available to brief any issues identified by the court. A California appellant is therefore never denied counsel.

As a matter of policy, a per se reversal rule is justified only when the error is so central and systemic that a reviewing court has no basis for assessing prejudice. In the instant case, even more than when ineffective assistance of trial counsel is alleged, a reviewing court is fully capable of looking at the record on direct appeal to determine whether appellate counsel's performance was deficient and, if so, whether that deficiency prejudiced his client. Here, a *Strickland* analysis dooms Robbins's claim. Appointed counsel could not find arguable issues to assert on direct appeal, because there was no evidentiary basis in the trial record for any. Moreover, even though the two lower federal courts found two issues arguable, no one has ever suggested that they were potentially winning issues.

C. The Ninth Circuit Impermissibly Applied a New Rule on Collaterial Review

Finally, the panel's decision violates the anti-retroactivity rule of *Teague v. Lane*, 489 U.S. 288. *Teague* required the federal court to survey the legal landscape at the time Robbins's conviction became final to determine whether "[the] state court . . . would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). In the instant case, it would not have been unreasonable for a judge to believe that California's *Wende* procedure was valid. As explained in the discussion on the merits, *Anders* was never intended to be a rigid formula, and there is ample basis to conclude that *Wende* addresses the core concerns of *Anders*. Arizona and Oregon courts had approved procedures similar to California's. In addition, another member of California's Central District bench denied a *Wende*-based ineffective-appellate-assistance claim at much the same time Robbins's petition was granted. J.A. 54-56.

The circuit court misapplied *Teague*, because there were reasonable interpretations of *Anders* other than that which Robbins now seeks. As this Court has more than once observed, state courts are coequal with the federal courts and are just as qualified to interpret the federal law as an intermediate federal appellate court. *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (conc. op. of Thomas, J.); *Sawyer v. Smith*, 497 U.S. 227, 241 (1990). The Ninth Circuit has completely lost sight of this limitation on the power of the federal courts to second-guess the state courts on debatable points of law.

ARGUMENT

I.

CALIFORNIA'S NO-MERIT BRIEF PROCEDURE PROVIDES INDIGENT APPELLANTS WITH DUE PROCESS, EQUAL PROTECTION AND EFFECTIVE ASSISTANCE OF COUNSEL

A. Introduction

Before this Court's decision in *Anders*, the representation of indigent appellants without arguable issues to present on appeal was informal and unstructured. In *Anders* itself, counsel filed a conclusory no-merit letter, explaining that he would not be filing a brief because he believed his client's appeal to be meritless. *Anders v. California*, 386 U.S. at 742. There, this Court held that an indigent appellant's rights to "substantial equality and fair process" were denied by the California procedure and described a process whereby the states could vindicate those rights. *Id.* at 744.

The California judiciary took immediate measures to implement changes in the state process to bring it into conformity with *Anders*. *People v. Feggans*, 67 Cal. 2d 444, 62 Cal. Rptr. 419 (Cal. 1967). *Feggans* required an indigent's appellate counsel who found no arguable issues to present a statement of facts with citations to the record. Counsel could properly ask to withdraw from the case but could not argue the case against his client. *Id.* at 447. If any issue was found to be reasonably arguable, the court was required to appoint counsel to brief that contention. *Id.* at 448.

Not content with merely meeting the threshold set by *Anders*, the California Supreme Court, under the

leadership of Chief Justice Bird, expanded the rights of indigent state appellants in 1979. *People v. Wende*, 25 Cal. 3d at 436. The *Wende* court devised what has become the standard California no-merit procedure, in which counsel presents a statement of the case and statement of facts with citations to the record, raises no specific issues, and asks the court to make its own independent review of the record in search of arguable issues. *Id.* at 438.

Counsel in *Wende* had submitted a declaration stating that he had advised his client he was filing a no-merit brief, that the client could submit his own brief and have counsel removed, and that counsel would send the client a copy. Counsel did not ask to withdraw. *Id.* The Court of Appeal in *Wende* had affirmed the judgment without conducting an independent search of the record for issues. *Id.* But the California Supreme Court held that *Anders* required the lower appellate court to conduct an independent review of the entire record. *Id.* at 441. The state supreme court also held that counsel need not move to withdraw from the case so long as he had informed his client of the latter's right to ask that counsel be relieved and had not argued against the client by describing the appeal as frivolous. *Id.* at 442.

Since then, in addition to the *Wende* reforms, the State of California has also erected an extensive and elaborate system of appellate projects designed to protect the rights of indigent appellants by providing multiple safeguards in the assignment, oversight and review of such cases. The protections California has implemented far exceed those envisioned by *Anders*.

The Ninth Circuit overlooked the practical and historical context in which California's no-merit procedure arose, mechanically rejecting the *Wende* procedure because it was not an exact duplicate of *Anders*. The central issue presented by this case is therefore the degree to which the lower federal courts are authorized to

intervene in the state courts' implementation of indigent criminal defendants' federal constitutional rights.

The Ninth Circuit immediately followed *Robbins* in two other published decisions, holding that the *Wende* procedure required habeas corpus relief even under the new standard of review of the Anti-terrorism and Effective Death Penalty Act, without even waiting to see if certiorari had been granted or denied in this case. *Delgado v. Lewis*, 168 F.3d 1148 (CA9 1998); *Davis v. Kramer*, 167 F.3d 494 (CA9 1998). The Warden submits that the states should be permitted to help shape the rules in this evolutionary process. Cookie-cutter adherence to *Anders* is neither necessary under this Court's precedents nor desirable as a matter of policy.

B. Precursors of *Anders*

Anders was one of a series of cases in which this Court reviewed the fair-trial/fair-appeal rights of indigent criminal defendants. In these cases, the Court declared that indigents were entitled to representation that was substantially equal to that which defendants and appellants with retained counsel could obtain.

In *Griffin v. Illinois*, the Court held that where a state allowed appellate review of criminal cases, due process and equal protection required it to afford impoverished appellants a review as adequate as that given appellants who could afford to pay. *Griffin*, 351 U.S. 12, 19 (1956). At issue in *Griffin* was the appellant's right to have the state provide him with a trial transcript free of charge. *Id.* The *Griffin* Court found that due process and equal protection required the state to provide an indigent appellant with a free transcript of the trial proceedings or find some other way to provide him with "adequate and effective appellate review." *Id.*

In *Gideon v. Wainwright*, 372 U.S. 335, this Court construed the Sixth and Fourteenth Amendments to require the state to provide an indigent criminal defendant with appointed counsel to represent him at trial. *Id.* at 344 ("recogniz[ing] that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him[]"). In *Douglas v. California*, a companion case to *Gideon*, this Court held that a criminal appellant could not be denied the assistance of counsel on his first appeal as of right on the basis of his indigence. *Douglas*, 372 U.S. 353, 356-57 (1963); *see also Swenson v. Bosler*, 386 U.S. 258, 259 (1967) (counsel must be available to prepare and file a brief).

C. The Decision in *Anders v. California*

Four years after *Gideon* and *Douglas*, and following hard on the heels of *Bosler*, this Court decided *Anders v. California*, in which it announced the Sixth Amendment right of indigent appellants to counsel, even when they had no nonfrivolous issues to assert, and applied its holding to the states through the due process and equal protection clauses of the Fourteenth Amendment. *Anders*, 386 U.S. at 741; *see also Evitts v. Lucey*, 469 U.S. 387, 403 (1985) (right of an indigent to effective assistance of counsel on appeal has its source in both the due process and equal protection clauses).

> "'Due Process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."

Evitts v. Lucey, 469 U.S. at 405 (footnote omitted).

In *Anders*, state appellate counsel had written a letter to the state reviewing court, simply explaining that he

would not file a brief because he believed the appeal had no merit. *Anders v. California*, 386 U.S. at 741-42. This Court held that a criminal appellant may not be denied representation on appeal based on appointed counsel's unsupported conclusion that he or she is of the opinion that there is no merit to the appeal. Counsel's bare assertion was an inadequate substitute for the attorney's acting as a vigorous advocate on behalf of his indigent client. *Id.* at 741-42. This Court concluded that California's no-merit letter procedure had denied the indigent his right to appellate counsel in violation of equal protection and due process. *Id.* at 741, 744. Since counsel had not acted as an advocate, his performance could not be reviewed. The error was therefore presumptively prejudicial.

In the course of disapproving the simple letter-brief procedure at stake in *Anders*, the Court also delineated procedures that would secure for an impoverished appellant the constitutional rights it had identified. The Court did not hold that these suggested procedures were compulsory or that they should be taken as a fixed and unyielding code of appellate procedure mandated to be enacted in every jurisdiction. *Anders*, 386 U.S. at 744.

The *Anders* Court acknowledged that an attorney may withdraw without denying the appellant counsel when the withdrawal is accompanied by certain safeguards. *Anders*, 386 U.S. at 744. If, after conscientiously examining the record, counsel concludes that the appeal is wholly frivolous, he may seek leave to withdraw, accompanying his request with a brief that refers to anything in the record that might arguably support an appeal. *Id.* When it receives a no-merit brief, the appellate court has the duty to conduct its own independent examination of the record to see if any nonfrivolous issues exist. If the court agrees with counsel's assessment, it may determine the appeal on the merits without assistance from counsel. *Id.* However, the court is obliged to appoint counsel to argue

the appeal if it finds nonfrivolous issues that might be raised. *Id.*

As this Court later explained in *McCoy v. Wisconsin*, 486 U.S. 429, 442 (1988), a state appellate court has two responsibilities when a no-merit brief is filed. First, the court must make certain that counsel has diligently and thoroughly searched the trial record for arguable claims. Second, the court must assure itself that appointed counsel is right in concluding that there were no nonfrivolous claims to raise.

D. California Expanded the *Anders* Protections

In the wake of *Anders*, appointed appellate counsel faced a dilemma described in Justice Stewart's *Anders* dissent:

> The Court today holds [the no-merit letter] procedure unconstitutional and imposes upon appointed counsel who wishes to withdraw from a case he deems "wholly frivolous" the requirement of filing "a brief referring to anything in the record that might arguably support the appeal." But if the record did present any such "arguable" issues, the appeal would not be frivolous and counsel would not have filed a "no-merit" letter in the first place.

Anders, 386 U.S. at 746. Ever since, California has been attempting to reconcile counsel's constitutional responsibilities to the client with the concomitant responsibility not to bring frivolous appeals.

The California Supreme Court promptly construed and applied *Anders*, finding that a no-merit letter no longer sufficed when counsel could find no arguable issues. *People v. Feggans*, 67 Cal. 2d at 447-48. Instead, counsel was required to prepare a brief to assist the court in understanding the facts and legal issues. The brief was to include a statement of facts with citations to the record,

a discussion of the legal issues with citations to authority and argument of all arguable issues. *Id.* at 447. If counsel concluded the appeal was frivolous, he could ask to withdraw but would not be permitted to do so until the appellate court was satisfied that he had discharged his duty to his client and the court to provide a statement of the facts and legal issues. *Id.* If counsel withdrew, the appellant was to be given the opportunity to file a brief in propria persona, after which the court was to decide for itself whether the appeal was frivolous. *Id.* If any claim was "reasonably arguable," regardless of how the court believed it would be resolved, the court was obligated to appoint new counsel to argue the appeal. *Id.* at 448.

In 1979, the California high court under Chief Justice Rose Bird refined the state procedure for implementing the due process and equal protection rights to counsel that had been declared in *Anders*. *People v. Wende*, 25 Cal. 3d at 441-42. The *Wende* court was not engaged in the systematic contraction of the rights of criminal defendants. Indeed, the state supreme court found that *Anders* was intended to increase protections for indigent no-merit appellants and undertook the *Wende* reforms in order to expand those rights. *Id.* at 441-42.

The *Wende* court adopted the *Anders* determination that a brief by counsel was a great improvement over a no-merit letter, because the brief assisted the court by referring to the trial record and legal authorities. *Id.* However, the court determined that neither *Anders* nor *Feggans* required counsel to state explicitly that he had found no arguable issues, because his failure to identify arguable issues could be inferred from his failure to raise any. *Id.* at 442.

In addition, the *Wende* court devised a method to permit counsel to remain available to assist his indigent client during the course of the appeal. Counsel did not have to withdraw, the court reasoned, if he informed his client of the latter's right to have counsel relieved and if

counsel had not disabled himself by describing the appeal as frivolous. *Id.*

Anders required "a brief referring to anything in the record that might arguably support an appeal. *Anders*, 386 U.S. at 744. The *Wende* court held that requirement was satisfied by a procedural summary and a statement of facts, with citations to the record. *Wende*, 25 Cal. 3d at 438, 442. Unlike the Ninth Circuit, the California court held that *Anders* did not require counsel to set forth his efforts and failure to find issues. *Id.* at 442. It reasoned that counsel's failure to find issues could be inferred from his failure to raise any. *Id.*

The *Wende* court concluded that the filing of a no-merit brief triggered the appellate court's duty to make an independent review of the record, even if the appellant did not submit a brief in propria persona. *Id.* at 441-42. The court specifically recognized that counsel's filing of a no-merit brief might ultimately secure the indigent client a more complete review than the client might receive after a merits brief had been filed. *Id.* at 442. This explanation confirms that the court's purpose was to enlarge the rights guaranteed by *Anders*, not to reduce them.

1. The Reviewing Court's Responsibilities

Although the California procedure varies somewhat from *Anders* in its particulars, it nonetheless assures that the state appellate court will fulfill the two responsibilities this Court has identified when a no-merit brief is filed. *McCoy*, 486 U.S. at 442. The first obligation of the court is to ascertain that counsel for an indigent appellant has diligently searched the record. The court is well able to reassure itself of counsel's diligence in a *Wende* appeal. Initially, counsel's citations to the record in support of his procedural history and statement of facts are a palpable demonstration that he has assiduously searched the trial record for arguable claims. In addition, appellate counsel

has declared under penalty of perjury that he has reviewed the entire record on appeal. Further, his appellate project reviewer also will have searched the record for issues. And finally, counsel is aware that the court will conduct its own independent search. With all these safeguards and layers of scrutiny, counsel's diligence is firmly assured.

The second duty of the court is to ascertain whether counsel was correct in concluding that the appeal is meritless. *McCoy*, 486 U.S. at 442. In California, the oversight of a skilled appellate project reviewer, in conjunction with the court's own independent review, assures the accomplishment of this goal. If the court finds any arguable issues, counsel must brief them.

The *Wende* procedure has been evolving for more than 30 years, applied in tens of thousands of no-merit appeals, without any challenge to its constitutionality until the 1997 decision in *Robbins*. The reason is plain: the state's bench and appellate bar reasonably believe that the *Wende* procedure fully vindicates the equal protection and due process rights of indigents to counsel on appeal.

2. California's Appellate Projects

California's courts have taken other measures to strengthen and expand *Anders*. In 1985, the California Judicial Council adopted Rule 76.5 of the California Rules of Court. *People v. Hackett*, 36 Cal. App. 4th 1297, 1311, 43 Cal. Rptr. 2d 219 (Cal. 1995). The rule required the state appellate courts to evaluate the qualifications of appointed counsel so that the attorney's skill corresponded to the length and complexity of the case and authorized the courts to delegate this responsibility to an administrator who had "substantial experience in handling criminal appeals." *Id*. The task has been delegated to five appellate project administrators and their "able and experienced [staff] lawyers." If appointed counsel cannot

find any non-frivolous issues, the supervising appellate project attorney searches the record again before authorizing the filing of a no-merit brief. *Id*.

The California Academy of Appellate Lawyers filed an amicus curiae brief in support of the Warden's petition for writ of certiorari. In that brief, the Academy informed the Court that the appellate projects provide indigent appellants with multiple levels of internal independent advocacy review. Initially, they evaluate the case in order to assign it to an appropriately experienced and skilled panel attorney. C.A.A.C. 6.[2] If the panel attorney is deemed proficient enough to work the case independently, he provides all legal services but consults with the project attorney. *Id*. When an "independent" panel attorney believes a no-merit brief should be filed, a project attorney reviews the record to provide a second opinion. *Id*. at 7.

Nearly half of the panel attorneys handle cases on an "assisted" basis. In those cases, a project attorney extensively reviews the trial record, identifying issues for the panel attorney to consider. *Id*. at 6. After that, the panel attorney conducts his own separate record review. *Id*. at 6, 7. Should panel counsel determine that there are no arguable issues, the staff attorney for the appellate project reviews the entire record to be certain that appointed counsel has not overlooked anything. *Id*. at 7.

As a practical matter, a no-merit brief is never filed in California without the concurrence of both the assigned panel attorney and the appellate project staff attorney. Thus, an indigent California appellant is given multiple independent reviews by at least two attorneys acting to protect the client's rights, even before the case is submitted to the court of appeal. C.A.A.C. 6-8. And,

---

2. The abbreviation "C.A.A.C." refers to the California Academy of Appellate Lawyers' amicus curiae brief in support of the Warden's petition for certiorari.

finally, the court conducts its own independent review of the entire record. *Hackett*, 36 Cal. App. 4th at 1311. In this way, and in the *Wende* procedure itself, indigent appellants' equal protection and due process rights to counsel are fully satisfied.

3. Equal Protection

The 14th Amendment equal protection clause is implicated when the state gives disparate treatment to individuals who are similarly situated. *Evitts v. Lucey*, 469 U.S. at 405. There is no basis to believe that California's indigent defendants are treated worse than their moneyed brethren. Quite the contrary.

The multi-layered and -reviewed process of preparing and deciding a brief involving an impoverished appellant has been described above. In contrast, it is highly improbable that a defendant represented by retained counsel who files a merits brief on appeal would ever have more than his attorney's independent search of the record for issues -- and without any institutional review or oversight. And the court, confronted with a merits brief, is obliged to resolve only the issues counsel has raised, not to conduct an independent search for issues. As the *Wende* court recognized, appointed counsel filing a no-merit brief on behalf of an indigent client may well obtain a more complete review than retained counsel could procure. *Wende*, 25 Cal. 3d at 442.

As the Chief Justice wrote more than a decade ago, equal protection is a component of the decisions extending the Sixth Amendment right to counsel on appeal. *Penson v. Ohio*, 488 U.S. 75, 90 (1988) (diss. op. of Rehnquist, C.J.). Even so, the state's federal constitutional duty

> . . . is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Pennsylvania v. Finley, 481 U.S. at 556, quoting *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). This Court has expressly rejected the notion "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such help must assume." *Finley*, 481 U.S. at 559. Indeed, the states have "substantial discretion" as to how they assist criminal defendants during the post-conviction review process. *Id.*

If there is any disparity in California's current handling of indigent criminal appeals, it is not that the state discriminates against indigent appellants with non-meritorious appeals. On the contrary, indigent no-merit appellants get more layers of advocacy review and fuller judicial review than that given indigent merits appellants, and far more than what is normally available to appellants with retained counsel.

4. Due Process and the Right to Counsel

The due process clause of the 14th Amendment requires an assessment of the fairness of the individual's treatment by the state, without comparison to the state's treatment of other individuals. *Evitts v. Lucey*, 469 U.S. at 405.[3]

California has addressed the due process concern by providing indigent appellants with (1) multiple independent advocates' reviews, (2) representation by

---

3. Not all jurists concede that a due process analysis is applicable to the right to effective assistance of appellate counsel. *Evitts*, 469 U.S. at 410 (diss. op. of Rehnquist, J.) ("the concept of due process in criminal proceedings is addressed almost entirely to the fairness of the trial"); *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974) ("There is no Due Process requirement for the state to provide a defendant with counsel to bring a discretionary appeal . . . .").

counsel selected, appointed and supervised by the appellate project, which is comprised of other counsel of demonstrated expertise, and (3) an independent court review. These procedures ensure that an indigent appellant with a no-merit brief receives a full measure of any process the 14th Amendment guarantees him.
The due process clause does not compel a state to provide an appellate process for criminal defendants at all. *Goeke v. Branch*, 514 U.S. 115, 120 (1995). However, when a state provides an appeal, an indigent criminal defendant is entitled to counsel on his first appeal of right. *Anders*, 386 U.S. at 742. The entitlement to counsel includes impoverished appellants whose counsel can find no arguable issues. *Id.* at 743.

5. Vindication of Robbin's Sixth and Fourteenth Amendment Rights on State Appeal

Robbins's state appellate counsel filed a brief that meets the constitutional requirements of *Anders*, as properly interpreted by California in *Feggans* and *Wende* and enhanced by the "projects" system. J.A. 26-37. The brief contained a two-page statement of the case and a detailed six-page statement of facts, with references to the record, from which the reviewing court could ascertain that counsel had searched the record. J.A. 27-34. In addition, counsel requested that the court independently examine the record. J.A. 35.

In his state-court declaration in support of the request for an independent review, counsel stated he had reviewed the entire record on appeal, examined the trial court file and exhibits and discussed the case with the attorney who had represented Robbins in the trial court before Robbins waived counsel. J.A. 36. The attorney also wrote to Robbins, explaining his evaluation of the appellate record and his intention to file a no-merit brief. *Id.* Counsel

informed Robbins of his right to file a supplemental brief, sent Robbins the trial transcripts and advised Robbins of his right to seek to have counsel removed. *Id.* Counsel did not withdraw as counsel of record but remained available to brief any issues that the court might identify. J.A. 35, 36. Before filing the no-merit brief, counsel consulted with the supervising California Appellate Project attorney, who concurred in his decision and gave him permission to file it. J.A. 43. Robbins also filed a six-page brief on his own behalf. J.A. 39. And finally, the appellate court independently reviewed the record for error. *Id.*

The procedure employed in this case not only protected Robbins's due process and equal protection interests in effective assistance of counsel on appeal but also aided the court in establishing that counsel had conducted a thorough search and finding that he was correct in concluding there were no arguable issues.

E. Nothing in This Court's Post-*Anders* Jurisprudence Undermines *Wende*

This Court's subsequent decisions on this issue do not support the Ninth Circuit's actions in *Robbins v. Smith*.

1. *Jones v. Barnes*

In 1983, this Court limited the *Anders* holding in *Jones v. Barnes*, 463 U.S. 745, 751 (1983). There, the indigent appellant had informed appellate counsel that he wanted seven claims raised. *Id.* at 748. Counsel raised three of the client's suggested issues but rejected the rest on grounds that they either would not assist the client to secure a new trial or there was no evidence in the record to support them. *Id.* at 747-48. The *Barnes* Court held:

> Neither *Anders* nor any other decision of this Court suggests, however, that the indigent

> defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.

Id. at 751. In fact, "[f]or judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*." *Id.* at 754. The Court explained that generally a case presents at most a few significant issues, and the addition of weak issues dilutes the strength of those that are stronger. *Id.* at 752. With the exception of three rights personal to the defendant at trial but not relevant on appeal, it is the attorney's duty to take professional responsibility for the case's management in consultation with his client. *Id.* at 752, 753 n.6. The Court emphasized "the importance of [counsel's] winnowing out weaker arguments on appeal[.]" *Id.* at 751. The Ninth Circuit's decision in *Robbins* is contrary to *Anders*, as explained in *Barnes*.

There is no reason to distinguish analytically between counsel who file merits briefs and those who file no-merit briefs. The reasoning in *Jones v. Barnes* can and should be applied to indigent no-merit appeals.

2. *Pennsylvania v. Finley*

Four years after its decision in *Jones v. Barnes*, this Court affirmed the "substantial discretion" of the states to develop and implement postconviction review procedures within the *Anders* framework. *Pennsylvania v. Finley*, 481 U.S. at 554-55, 559. In *Finley*, this Court found that an indigent defendant who was bringing a collateral attack on his conviction had no federal constitutional right to counsel. *Id.* at 555. Consequently, the state had no equal protection duty to clone the legal forces that a criminal

defendant of means might bring to bear in seeking a reversal, but only to afford him a fair chance to present his appellate claims. *Id.* at 556; *Ross v. Moffitt*, 417 U.S. at 616. The *Finley* decision acknowledges that flexibility is preferable to forcing the states to march in lock-step. Although *Finley* was determined in the context of a collateral postconviction proceeding, its respect for state courts' understanding of the Constitution, and commitment to following it, apply with equal vigor to a first appeal as of right.

3. *McCoy v. Court of Appeals of Wisconsin*

In 1988, this Court issued decisions in *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, and *Penson v. Ohio*, 488 U.S. 75. Because of their unusual facts, the application of *Penson* and *McCoy* is narrow and limited. They do not affect the central analysis of *Anders*, and they provide no support for the Ninth Circuit's invalidation of *Wende*.

In *McCoy*, appellate counsel purposely violated a Wisconsin rule of court which required counsel to state why he thought the appeal was baseless. Believing the rule was unethical and contrary to *Anders*, counsel sought to have it declared unconstitutional. *McCoy*, 486 U.S. at 432-33. The Wisconsin Supreme Court rejected McCoy's argument, as did this Court. *Id.* at 433-34, 442-43. Premising its decision on equal protection and the Sixth Amendment right to counsel, this Court stated that it did not expect an *Anders* brief to serve as a substitute for an advocate's brief, but only to assist the state reviewing court in deciding whether the appeal is so frivolous that the defendant has no federal constitutional right to have counsel present the case to the court. *McCoy*, 486 U.S. at 439-40 n.13. It held that appointed counsel's motion to withdraw from a frivolous appeal does not provide an indigent defendant with less effective representation than

one who is represented by retained counsel. *McCoy*, 486 U.S. at 437-38.

The Warden submits that *McCoy* merely approves Wisconsin's method of handling indigent appeals. It does not purport to discredit other interpretations of *Anders*. All that *Anders* guarantees an indigent defendant is "a diligent and thorough review of the record and an identification of any arguable issues revealed by that review." *McCoy*, 486 U.S. at 439. The *McCoy* Court did not envision the no-merit brief as a substitute for an advocate's brief on the merits. Instead, the no-merit brief was designed to assist the court in deciding whether the appeal was so frivolous that the criminal appellant did not have a federal constitutional right to counsel. *McCoy*, 486 U.S. at 439-40 n.13.

Although it relates to a procedure quite different from California's, the *McCoy* decision validates the idea that a state should have the flexibility to implement *Anders* in accordance with that state's needs and that a no-merit brief need not substitute for an advocate's brief. Under *McCoy*, there is no reason to jettison California's no-merit brief procedure.

4. ***Penson v. Ohio***

Some months after its decision in *McCoy*, this Court decided *Penson v. Ohio*, reaffirming an indigent's right to counsel on appeal. 488 U.S. 75. In *Penson*, appellate counsel declined to file a brief in a case he believed meritless and instead filed a "Certification of Meritless Appeal," which resembled the letter brief disapproved in *Anders*. *Penson*, 488 U.S. at 80-81 and 81 n.3. Counsel's no-merit certification erroneously failed to draw attention to anything in the record that might have supported the appeal, leaving the Ohio court with no basis for concluding counsel had performed his duty carefully. *Penson*, 488 U.S. at 81-82. By way of contrast, California's

appointed attorneys provide detailed citations to the record, which demonstrate to the court that counsel has met his responsibilities. In addition, the Ohio reviewing court erred in granting counsel's request to withdraw from the case before it had independently reviewed the record. *Id*. at 82-83. "Most significantly, the Ohio court erred by failing to appoint new counsel to represent petitioner after it had determined that the record supported 'several arguable claims.'" *Id*. at 83. In *Penson*, this Court held that the identification of arguable issues by the Ohio reviewing court made it mandatory to appoint counsel to brief them, and the error in failing to do so was reversible per se. *Id*. at 85-86. *Penson* is inapplicable to the *Wende* procedure, because an indigent California appellant is never without counsel.

Neither *Anders* nor the federal Constitution required the Ninth Circuit to upset *Wende*. The California procedure addresses Robbins's due process and equal protection rights to appellate counsel. It provides sufficient information so that the court can be assured that counsel has performed a diligent and thorough review of the record in his search for issues, and the court can make its own independent review.

The appropriate question for the Ninth Circuit to have asked is whether the state procedure under consideration "is consistent with [the Supreme Court's] holding in *Anders*." *McCoy*, 486 U.S. at 440. It is. Nothing in the federal Constitution and nothing in this Court's cases supports the Ninth Circuit's programmatic and unyielding application of *Anders*. Nothing in the federal Constitution and nothing in this Court's cases warranted the Ninth Circuit's decision to annul California's *Wende* procedure.

II.

STATE APPELLATE COUNSEL'S PERFORMANCE SHOULD HAVE BEEN EVALUATED UNDER *STRICKLAND v. WASHINGTON*

In *Robbins*, the Ninth Circuit did not merely find that state appellate counsel's failure to raise any issues on appeal constituted error. It also found that the error amounted to a denial of counsel and was thus presumptively prejudicial. J.A. 87-90, 94. The federal appellate court relied for its finding on this Court's decision in *Penson v. Ohio*, J.A. 85, 94, and now has explicitly rejected the contention that counsel's performance should be evaluated in accordance with *Strickland v. Washington*, 466 U.S. 668. *Delgado v. Lewis*, 168 F.3d 1148 ("Delgado did not need to show prejudice because the failure of his counsel to raise arguable issues in the appellate brief creates a presumption of prejudice"); *Davis v. Kramer*, 167 F.3d at 499 ("No separate *Strickland* competence analysis is called for when counsel fails to comply with *Anders*"). Once again, there is no basis in this Court's decisions or in the federal Constitution for this drastic conclusion.

In California, under the *Wende* procedure, an indigent appellant is never without counsel. Moreover, counsel who files a no-merit brief secures a significant benefit for his client: the court's independent review, to which he would otherwise not be entitled. Under these circumstances, presuming prejudice is not only needless but also unfair to the state. This Court's established *Strickland* procedure for evaluating the performance of counsel is the apt and obvious analytical tool.

A. The Two-Part *Strickland* Test for Ineffective Assistance

The touchstone is settled. Where a represented defendant asserts ineffective assistance, his claim will be subjected to the "rigorous standard" for ineffective-assistance claims dictated by the two-part *Strickland* test. *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986); *see also Lockhart v. Fretwell*, 506 U.S. at 369; *Strickland*, 466 U.S. at 687. In order to prevail, a defendant must first overcome a strong presumption that counsel's performance was reasonable and demonstrate that it was objectively deficient. *Id.* at 689. In addition, the defendant must show prejudice, which requires that he prove that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. *Strickland* requires reviewing courts to presume the adequacy of counsel's assistance, assess attorney performance as of the time counsel was required to act, and avoid the distortions of hindsight. *Id.* at 689-90. Robbins could never have demonstrated prejudice, because, even if his claims were nonfrivolous in the abstract, there was no factual basis for them in the record to which the appeal was confined, and thus no possibility of success.

In *Lockhart v. Fretwell*, a capital case, this Court held that trial counsel's failure to make an objection that would have been successful at the time under a later-overruled decision rendered neither the trial fundamentally unfair nor the result unreliable. *Lockhart*, 506 U.S. at 366. The Court noted that the Sixth Amendment does not come into play unless counsel's unprofessional conduct affects the trial's reliability. *Id.* at 369. Put another way, in order to demonstrate prejudice, the defendant must establish that counsel's defaults rendered the proceeding unreliable or fundamentally unfair. *Lockhart*, 506 U.S. at 369-70; *United States v. Cronic*, 466 U.S. 648, 658, 659 n.26 (1984);

see also Williams v. Taylor, 163 F.3d 860, 869 (CA4 1998), cert. gtd. at 67 U. S. L. W. 3613, 1999 U.S. Lexis 2522 (4/5/99) ("*Lockhart*'s emphasis on reliability and a fair trial simply clarified the meaning of prejudice under *Strickland*.")

The Ninth Circuit relied on *Penson v. Ohio* to support its preference for a presumption of prejudice rather than the application of *Strickland*. *Penson* is inapplicable on its facts. There, the state reviewing court had erred in granting counsel's request to withdraw from the case before it independently reviewed the record and, even more significantly, in failing to appoint new counsel to represent Penson after it had found "several arguable claims." *Penson*, 488 U.S. at 82-83. Because those two state-court failures left Penson without counsel, the errors were reversible per se. *Id*. at 86.

By way of contrast with *Penson*, California's approach neither prematurely grants a motion to withdraw nor forces an appellant with nonfrivolous issues to go forward without legal counsel. Since counsel remains available to assist his client and is assigned to brief any issues the California reviewing court identifies as arguable, it is neither necessary nor appropriate to apply a standard of per se reversibility to the *Wende* procedure. Counsel's performance should be evaluated in accordance with the usual standards for effective assistance.

As this Court has explained, most constitutional errors are subject to harmless-error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). This is so because most errors occur during the presentation of the case at trial and can be evaluated in the context of the remaining evidence to determine prejudice. *Fulminante*, 499 U.S. at 307-08. The few errors subject to per-se reversal are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id*. at 309. The total denial of counsel and the presence of a biased judge are two often-cited

examples of structural error. *Id*. at 309 n.8; *see also Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 659 n.25. Structural errors, in other words, are those which infect the entire framework of the trial, as opposed to errors in the trial itself. *Fulminante*, 499 U.S. at 310.

The claimed error in failing to raise any issues on appeal under California's *Wende* procedure is not structural error, because prejudice can be readily evaluated on the basis of the appellate record, which is available for the court's review. In that sense, there is no meaningful distinction between counsel who raises a single issue on appeal and one who raises no issues at all. In fact, the Warden respectfully suggests that the Ninth Circuit's decision poses a different kind of equal protection problem, because appellants whose lawyers file merits briefs must demonstrate prejudice, while those whose attorneys file no-merit briefs enjoy a presumption of prejudice. In the instant case, for example, if appointed counsel had pressed but one of the meritless claims Robbins sought to assert, Robbins would have had to prove both sub-standard performance and prejudice. Because counsel declined to raise any issues, Robbins has received a per-se-reversal windfall. All appellants claiming inadequate counsel ought to be required to show both deficient performance and resultant prejudice.

Counsel who files a no-merit brief can also be compared to defense counsel at trial who makes no objections and puts on no affirmative defense. Like appellate counsel, a trial attorney need not manufacture a defense or engage in unethical practices. *United States v. Cronic*, 466 U.S. at 656-57 n.19. Trial counsel's performance under those circumstances, even if below the norm, is not presumed prejudicial and reversible per se. It is subjected to *Strickland* analysis, which requires the defendant to demonstrate both deficient performance and a fundamentally unfair result. *Lockhart v. Fretwell*, 506 U.S. at 369-70.

Since a direct appeal is confined to matters in the trial record, the mechanics of evaluating appellate counsel's performance -- regardless of whether he does or does not raise issues -- are far simpler than those required to assess trial counsel's. Indeed, the only reason to presume prejudice in a case such as this is an abiding distrust in counsel and the state courts -- a belief that "competent" appellate counsel can always find *something* to raise, coupled with a suspicion that appellate courts do not conduct a genuinely independent review. As a practical matter, the Ninth Circuit's decision declares that there is no such thing as a frivolous appeal.

More than three decades ago, Justice Stewart, writing in dissent, explained that the "quixotic" *Anders* rule could only be premised "upon the cynical assumption that an appointed lawyer's professional representation to an appellate court in a 'no-merit' letter is not to be trusted. That is an assumption to which I cannot subscribe." *Anders*, 386 U.S. at 746-47 (diss. op. of Stewart, J.). The recent opinions of the Ninth Circuit in *Robbins*, *Davis* and *Delgado* display that cynicism in full flower.

Such suspicions are utterly unfounded, especially in this case, because California provides multiple layers of advocacy review before the case ever reaches the appellate court. A rule of per se reversal makes no sense, as applied to California's *Wende* procedure.

In the instant case, heedless of *Fulminante*, the Ninth Circuit analyzed counsel's good-faith and reasonable professional judgment in *Robbins* as if it amounted to a denial of counsel akin to *Gideon*. Nothing could be further from the truth. In the Ninth Circuit's expansive view, the law library and counsel issues should have been raised. Even assuming for argument's sake that those issues were merely weak rather than frivolous, a reviewing court can readily determine they could not possibly have been successful, because Robbins, foundering through his trial in pro per, had made no trial record to support them.

Even assuming arguendo that the issues could have been raised on appeal, none of them even remotely demonstrate that the result of the trial was unfair or unreliable.

B. *Strickland's* Application to the Case at Hand

In the instant case, Robbins suggested numerous putatively nonfrivolous appellate issues. J.A. 1, 7, 45, 81. The Ninth Circuit and district court identified only two that should have been, but were not, raised by state appellate counsel: the adequacy of the jail's law library and the propriety of the trial court's denial of Robbins's motions relating to the appointment of counsel of his choice and advisory counsel in place of the public defender. J.A. 51-52, 88-89. In their haste to identify viable appellate claims, the lower federal courts overlooked a fatal flaw, one that was obvious to Robbins's state appellate counsel. State appellate counsel understood that both claims were perfectly frivolous because neither claim had been preserved for appeal by a timely and specific objection at trial. Robbins himself refuted both claims with his on-the-record statement to the trial court just eight days before the trial. Robbins insisted on representing himself, but asked for advisory counsel:

> . . . I would like to have the assistance of counsel at the trial. I am not real good at public speaking. I am doing okay as far as the law work and stuff. Obviously, I am not a lawyer, but I need somebody to help me present the case.

J.A. 300, 320. The lower federal courts were wrong to believe that these two issues were nonfrivolous. They compounded their error by determining that these claims

entitled Robbins to the windfall of an automatic reversal and a new appeal.

1. Adequacy of the Law Library

Deficiencies in the law library were first mentioned in the supplemental petition in the district court, not as a "claim," but as an example of Robbins's contention that he was denied the opportunity to prepare a meaningful defense. C.R. 25 at 8, 28-29.[4] The District Court, with the Ninth Circuit's ultimate concurrence, sua sponte transformed Robbins's law library illustration into an arguable appellate issue. J.A. 49-51, 89. At no time before or during the trial did Robbins claim that the jail law library was lacking, let alone constitutionally deficient. Not surprisingly, he presented no evidence to support such a conclusion. Nothing in the record shows that the jail law library was actually inadequate. Indeed, there was nothing in the record to show what the conditions of the library actually were. There was, quite simply, nothing to appeal.

On May 2, 1990, when Robbins announced he would not be ready for the May 16 trial date, the court warned Robbins about the hazards of self-representation, painting a bleak picture of the process and likely result, including a discouraging description of the law library.[5] J.A. 255-57.

---

4. "C.R." refers to the clerk's record in the United States District Court.

5. It was entirely proper for the trial court to make petitioner aware of the possible limitation or suspension of his pro per privileges, including access to the law library. *People v. Davis*, 189 Cal. App. 3d 1177, 1195 n.19, 234 Cal. Rptr. 859 (Cal. 1987); overruled on another point in *People v. Snow*, 44 Cal. 3d 216, 225, 242 Cal. Rptr. 477 (Cal. 1987).

The trial judge's warning about the law library were hyperbolical. Robbins never complained to the trial court -- or any other state court -- that the law library was inadequate. On the contrary, Robbins did "okay as far as the law work and stuff." J.A. 320. Under California law, failure to object at trial forfeits Sixth and Fourteenth Amendment claims on appeal. *People v. Sanders*, 11 Cal. 4th 475, 510 n. 3, 521 n. 14, 46 Cal. Rptr. 2d 751 (Cal. 1995). In addition, it is settled California law that the factual basis for a direct-appeal claim must appear on the face of the record and, even if Robbins had objected, there was no evidence adduced at trial to permit relief on this claim on appeal. Cal. R. Ct. 4, 5; *In re Kathy P.*, 25 Cal. 3d 91, 102, 157 Cal. Rptr. 874 (Cal. 1979). Because Robbins failed to object to the law library at trial, the issue was outside the record and could not have been raised on direct appeal. It would have been fruitless for state appellate counsel to raise a claim that was not merely waived by the lack of an objection in the trial court, but was affirmatively refuted by Robbins himself.

On the merits, the law library claim was plainly frivolous as well. California law requires a showing of prejudice from a defendant who alleges that he has been denied adequate access to legal materials. *People v. Davis*, 189 Cal. App. 3d at 1195. Whatever the library's limitations, Robbins himself assured the trial court that he was not prejudiced. Just eight days before trial, on August 9th, he told the trial court "[he was] doing okay as far as the law work and stuff[,]" but needed someone to help him with the public speaking. J.A. 320.

The rest of the pretrial record corroborates Robbins's assurances. Robbins had used the library. He filed numerous researched motions with the court. *See, e.g.*, J.A. 268-71. His up-to-the-minute assessment a week before trial that the law library was adequate for his needs was verified by his written pleadings. J.A. 320. In other

words, Robbins could not possibly have shown prejudice on appeal, even if he had been able to raise the claim.

The canons of professional ethics limit permissible advocacy. Neither privately retained nor appointed counsel is free to clog the courts with frivolous motions or appeals. *Polk County v. Dodson*, 454 U.S. 312, 323 (1981). In California, the Rules of Professional Conduct state:

> A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:
>
> . . . .
>
> (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Rule 3-200, Cal. R. Prof. Conduct. An issue which is without a factual or legal basis is plainly frivolous. *People v. Johnson*, 123 Cal. App. 3d 106, 109, 176 Cal. Rptr. 390 (Cal. 1981). As counsel understood, he was ethically precluded from raising a baseless issue which would necessarily have failed on appeal. Robbins has failed to show deficient performance, let alone prejudice.

2. Counsel

Nor did counsel have available a nonfrivolous claim relating to the appointment of counsel at trial. Over many months' time, Robbins compiled a considerable record of attempting to manipulate the system to his own ends, including no less than seven of-record hearings before four different superior court judges, relating to his requests to dismiss the public defender, have counsel of his choice appointed to represent him, represent himself, and obtain

advisory counsel to assist him.[6] J.A. 95-119, 166-207, 208-43, 244-50, 251-67, 283-99, 300-25. Notwithstanding Robbins's demonstrated unwillingness to cede control of his case back to the public defender, J.A. 322-23, the Ninth Circuit held that the state court's denial of Robbins's attempt to withdraw the waiver of his right to counsel was erroneous. J.A. 88. The predicate of this determination was faulty: there was no of-record showing that Robbins ever attempted to withdraw his waiver of counsel. Because the court's conclusion is without support in the record, this issue, as well, would have been frivolous on direct appeal.

A defendant who knowingly and intelligently chooses to represent himself has a right to do so under the federal constitution. *Faretta v. California*, 422 U.S. 806, 807 (1975). In order for his election to be knowing and intelligent, the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *People v. Pinholster*, 1 Cal. 4th 865, 928, 4 Cal. Rptr. 2d 765 (Cal. 1992) (internal quotation marks omitted).

a. Advisory Counsel

However, a criminal defendant does not have a right both to be represented by counsel and to represent himself. "Indeed, such an arrangement is generally undesirable." *People v. Clark*, 3 Cal. 4th 41, 97, 10 Cal. Rptr. 2d 554 (Cal. 1992); *see also McCaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (pro se defendant has no right under *Faretta* to the "hybrid representation" of standby counsel). Only if a defendant makes a "substantial" showing that it will promote "justice and judicial efficiency" in his case

---

6. Robbins apparently received two additional municipal court hearings relating to his dissatisfaction with counsel. J.A. 168.

does state law even grant the trial court the discretion to authorize advisory counsel. *Clark*, 3 Cal. 4th at 97. Otherwise, the motion is properly denied. *Id*. The denial of advisory counsel is not an abuse of discretion where it is based on the trial court's understanding and conscious exercise of its discretion. *Id*.

When counsel has been appointed, his client surrenders all but a few fundamental personal rights to his attorney, who has complete control of decisions relating to defense tactics and strategies. *People v. Hamilton*, 48 Cal. 3d 1142, 1163, 259 Cal. Rptr. 701 (Cal. 1989). A court should not appoint an attorney to defend an indigent defendant "and require of him that in so doing he surrender any of the substantial prerogatives traditionally or by statute attached to his office." *Id*.

In this case, Robbins made no showing that advisory counsel would promote justice and judicial efficiency. Indeed, to all indications, permitting Robbins to retain control of his case and direct an attorney's work would have defeated those ends. During the seven hearings relating to Robbins's request for other representation, self-representation and advisory representation, four different judges heard Robbins's arguments, understood their discretion and exercised it to deny Robbins advisory counsel. J.A. 95-119, 166-207, 208-43, 244-50, 251-67, 283-99, 300-25. The last of the four judges finally told Robbins:

> You filed every possible motion that you could file to delay this matter . . . and keep the matter from being brought to trial. . . . I am not going to appoint advisory counsel. ¶ As I said, I will do everything I can to insure that you have a fair trial, but *I am not going to appoint advisory counsel. It's a matter of discretion with me. I exercise my discretion. The answer is no.*

J.A. 324 (emphasis added). When the record supports the inference that a pro se defendant is acting with

manipulative intent in his effort to obtain advisory counsel, the trial court may properly deny his request. *People v. Crandell*, 46 Cal. 3d 833, 863, 251 Cal. Rptr. 227 (Cal. 1988). The denial of advisory counsel was proper, because Robbins could not make the substantial showing that such an appointment would promote justice and judicial efficiency in his case, as was required under state law. In finding that Robbins had engaged in purposeful delay, the trial court determined that he was manipulating the court, a finding that separately justified the court's denial of advisory counsel. *Id*.; J.A. 324.

The denial of advisory counsel issue would have had no reasonable potential for success if raised on appeal. *Johnson*, 123 Cal. App. 3d at 109. It, too, was a frivolous claim. Even if that were not so, the denial of advisory counsel raise no federal constitutional issue and thus could not possibly have resulted in an unconstitutionally unfair and unreliable trial.

b. <u>Primary Counsel</u>

Concluding that the trial court failed even to consider whether Robbins was reasserting his right to primary counsel, the Ninth Circuit found that appellate counsel should have raised the issue. J.A. 88-90. A closer look at the record reveals that Robbins never withdrew his *Faretta* waiver at trial. The Ninth Circuit's conclusion is erroneous.

When a defendant exercises his right to be represented by professional counsel, it is counsel, not the client, who has charge of the case. *Hamilton*, 48 Cal. 3d at 1163. "By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to *counsel's* complete control of defense strategies and tactics." *Id*. (emphasis in original).

On August 9th, Robbins asked for a lawyer's help. J.A. 320-22. After refusing him advisory counsel, the

court treated Robbins's request as one for primary counsel and offered to reappoint the public defender. J.A. 322-23. If Robbins had been interested in unequivocally surrendering his *Faretta* rights, he would have accepted the court's offer to reappoint the public defender. He did not. J.A. 323. Viewed in context, Robbins's own words reveal that any claim on appeal to having unequivocally withdrawn his *Faretta* waiver would have been utterly spurious. On this record, counsel on appeal properly recognized that the trial court's exercise of its discretion was unassailable, and the counsel issue was meritless.

3. No Showing of Deficient Performance or Prejudice

Counsel and the state appellate courts properly concluded that Robbins's case was wholly frivolous, because none of the legal issues were arguable on the merits. *Penson*, 488 U.S. at 81; *see also Neitzke v. Williams*, 490 U.S. 319, 325 (1989), quoting *Anders*, 386 U.S. at 744. There is no support in the record for the claims identified by the lower federal courts as arguable issues. Both of them are frivolous, and counsel was ethically bound not to raise frivolous issues on appeal. *Polk County v. Dodson*, 454 U.S. at 323; Rule 3-200, Cal. R. Prof. Conduct.

Under these circumstances, it is grossly unfair to California for the federal courts to presume prejudice and award Robbins the windfall of an automatic reversal, because "justice, though due to the accused, is due to the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). Counsel's representation should not be presumed ineffective; it can and should be judged in accordance with *Strickland*. Since Robbins cannot demonstrate either deficient performance or an unfair result, the federal writ should have been denied, and this Court should reverse the judgment of the Ninth Circuit.

III.

THE *TEAGUE* PROHIBITION AGAINST THE APPLICATION OF NEW RULES ON COLLATERAL REVIEW BARRED THE NINTH CIRCUIT FROM OVERTURNING *WENDE*

The Ninth Circuit's sudden revelation of *Wende*'s invalidity came on collateral review, in a case in which the panel slighted this Court's jurisprudence by deciding the *Teague* point last and without even pretending to survey the legal landscape to determine whether "[the] state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). The circuit court misapplied *Teague*, because there were reasonable interpretations of *Anders*, counseling affirmance of Robbins's conviction, other than that which Robbins sought. Thus, the circuit's interpretation of the Constitution is not only wrong on the merits, but, even if right, is nevertheless a flagrant violation of this Court's consistent prohibitions against applying a new rule on collateral review. *Teague v. Lane*, 489 U.S. at 310.

As this Court has repeatedly recognized in a line of cases beginning with *Teague*, a state prisoner must demonstrate to the federal habeas court that he does not seek the retroactive benefit of a new rule of constitutional law, or even a settled rule applied in a novel setting. *O'Dell v. Netherland*, 521 U.S. at 156-57. When raised by the state, "the court *must* apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (emphasis in original); *cf. Stewart v. LaGrand*, 119 S. Ct. 1018, 1020 (1999); *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). The *Teague* doctrine validates reasonable, good faith interpretations of precedent by

state courts. *O'Dell*, 521 U.S. at 156. There can be no real debate that *Wende* is a reasonable, good-faith interpretation of *Anders*.

Relief is barred by *Teague* unless, at the time Robbins's conviction became final, every reasonable state jurist would have felt compelled by existing precedent to conclude that the relief Robbins now seeks was required by the Constitution. *O'Dell*, 521 U.S. at 156. The new-rule principle is intended to assure that "gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. at 234. It applies even if the initial state-court ruling proves contrary to later decisions. *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

When a federal court extends the rationale of an existing rule, based on intervening changes in the law, it violates *Teague*. *Caspari v. Bohlen*, 510 U.S. at 395-97; *Butler v. McKellar*, 494 U.S. at 412-13. And, regardless of contrary authority, the very existence of valid precedents that support the state court's good faith, reasonable decisions works to preclude the retroactive application of new rules proscribed by *Teague*. *Id.*; *see Sawyer v. Smith*, 497 U.S. at 237-38 (1990); *Saffle v. Parks*, 494 U.S. 484, 491 (1990). If relief on a claim was not "*dictated* by precedent," in the sense that "*no other* interpretation was reasonable," the retroactive application of the rule violates *Teague v. Lane*. *Lambrix v. Singletary*, 520 U.S. at 538. (emphasis in original). Cases invoked at too great a level of generality provide the court with no meaningful guidance in resolving a *Teague* question. *Gilmore v. Taylor*, 508 U.S. 333, 344 (1993); *accord Gray v. Netherland*, 518 U.S. 152, 169 (1996); *Sawyer v. Smith*, 497 U.S. at 236.

There are three steps in the *Teague* analysis. First, the court must determine when the state conviction became final. Second, the court must survey the legal

landscape as it then existed to determine whether a state court considering the claim would have felt compelled by existing precedent to conclude that the rule sought by the state prisoner was required by the Constitution. Third, if the court determines that a petitioner seeks the benefit of a new rule, it must consider whether the rule falls within one of two "narrow exceptions to nonretroactivity." *Lambrix v. Singletary*, 520 U.S. at 527.

Robbins's conviction was final for purposes of this analysis on January 19, 1993. Rule 13, Rules of the Supreme Court of the United States; *Caspari v. Bohlen*, 510 U.S. at 380. California's no-merit brief procedure, its interpretation of *Anders*, had been evolving since 1967. *People v. Feggans*, 67 Cal. 2d 444. *Wende* itself had been in place since 1979. *Wende*, 25 Cal. 3d at 441-42.

As discussed in argument I above, after this Court invalidated California's no-merit-letter procedure, the California courts construed and applied the rule in *Anders*. *Anders v. California*, 386 U.S. at 741-42; *People v. Feggans*, 67 Cal. 2d at 447-48; *see also People v. Wende*, 25 Cal. 3d at 441-42. Research reveals no direct constitutional challenge to the holdings of *Feggans* and *Wende*. Consequently, reasonable California jurists have relied on *Feggans* and *Wende* as valid declarations of the *Anders* requirements for no-merit briefs in indigent criminal appeals.

Before the Ninth Circuit overturned the state court's reasonable expectations, it was obliged under *Teague* to conduct a survey of the legal landscape at the time Robbins's conviction became final. *O'Dell v. Netherland*, 521 U.S. at 160; *Lambrix v. Singletary*, 520 U.S. at 527. Such a survey would have revealed that not all state judges would have felt constitutionally compelled by existing precedent to reach the result Robbins now seeks.

Although the Ninth Circuit suggested that the analysis in *Penson v. Ohio* is controlling, J.A. 90, nothing in *Penson* mandates the result Robbins seeks. Indeed, it is notable

that in the seven years between *Penson* and *Robbins* it does not appear to have occurred to anyone that *Penson* invalidated California's *Wende* procedure. That is not surprising, because *Penson* does not require such an outcome.

In *Penson*, appellate counsel declined to file a brief in a case he believed meritless and instead filed a no-merit certification that resembled the letter brief disapproved in *Anders*. *Penson*, 488 U.S. at 80-81 and 81 n.3. Unlike California's *Wende* procedure, counsel's certification gave the Ohio court no basis for concluding he had performed his duty carefully. *Penson*, 488 U.S. at 81-82. In addition, again as distinct from California, the Ohio court erred in granting counsel's request to withdraw from the case before it independently reviewed the record. *Id*. at 82-83. However, the state court's pivotal error was in failing to provide Penson with counsel even after it had reversed one count and found "'several arguable claims.'" *Id*. at 83. The error in failing to appoint counsel was held to be reversible per se, because the Ohio procedure had actually, *Gideon*-like, denied a merits appellant counsel on appeal. *Id*. at 85-86. In California, by way of contrast, an indigent appellant is never without counsel. Accordingly, reasonable California judges could have understood *Penson* to be factually inapplicable to the *Wende* procedure.

The Ninth Circuit's application of *Teague* was grudging and superficial. By leaving the *Teague* issue for last, the panel disregarded this Court's admonition that the new-rule issue "*must* apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. at 389 (emphasis in original). Nor did the panel take the trouble to survey the legal landscape as it existed in 1993.

If it had done so, it would have found that the legal landscape validated the reasonableness of California's interpretation of *Anders*. For example, in Oregon, an appointed attorney who concludes that there are no non-

frivolous issues to present "has no mandatory ethical obligation to withdraw from the representation[,]" so long as he himself does not knowingly advance an unwarranted claim. *State v. Balfour*, 311 Or. 434, 448, 814 P.2d 1069, 1078 (Or. 1991). Construing *Anders* in light of *Penson* and *McCoy*, the *Balfour* court concluded it would not further counsel's ability to discharge his ethical obligations to his client and the court if counsel were compelled to file an *Anders* brief "spell[ing] out the potentially limitless variety of 'arguably supportive' issues that counsel can fabricate or discern." *Balfour*, 814 P.2d at 1079. Appellate counsel in Oregon has no obligation to include argument in the brief. *Balfour*, 814 P.2d at 1080.

Arizona's no-merit procedure closely resembles California's, in that appointed counsel is expected to present a detailed statement of the case and facts, with references to the record, but without listing issues counsel has declined to advance. *State v. Clark*, 1999 Ariz. App. Lexis 11, 287 Ariz. Adv. Rep. 7, slip op. ¶¶ 2, 13-14 (Ariz. 1999). The *Clark* court declined to follow *Robbins*, finding the Arizona procedure superior to the Ninth Circuit's mechanical adherence to the narrowest reading of *Anders*, because it protects the interests identified by *Anders* without requiring counsel to violate their ethical duties to their clients. *Clark*, slip. op. ¶¶ 31-32. The court noted that a detailed factual and procedural history with citations to the trial record permitted a court to be certain that counsel had actually reviewed the record and assisted the court in determining whether counsel was correct in concluding that the appeal was frivolous. *Id*. at ¶ 32. The *Clark* court also pointedly noted that

> [the] continued survival of the various approaches [to *Anders*] suggests that the Supreme Court recognizes that there is more than one acceptable way to resolve the conflict between counsel's ethical obligations and an

indigent defendant's right to effective appellate representation.

Id. at ¶ 29. The *Clark* court concluded such variations were permissible, so long as the state procedure guaranteed indigent appellants their due process and equal protection rights to effective assistance of counsel. *Id.* The decision in *Clark* cited to Arizona's unfolding interpretation of *Anders* in *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (Ariz. 1984), and *State v. Scott*, 187 Ariz. 474, 478 n.4, 930 P.2d 551, 555 n.4 (Ariz. 1996). *Clark*, ¶¶ 30. Arizona's rule was thus part of the legal landscape at the time of Robbins's appeal. ¶ 1.

Like reasonable state-court judges acting in good faith, reasonable federal judges doing likewise could -- and did -- differ on whether California's *Wende* procedure meets the mandates of *Anders*. For example, in deciding *Marroquin v. Prunty*, No. CV 95-2477-KN, in which another federal habeas corpus petitioner contemporaneously raised a similar *Wende*-based claim of ineffective assistance of appellate counsel, Judge David Kenyon of the Central District of California did not feel compelled by *Anders* to overturn California's no-merit procedure and in an unpublished decision denied the writ. J.A. 54-56.

The fact that *Balfour*, *Clark* and *Marroquin* are part of the legal landscape is palpable proof that all reasonable jurists would not have felt compelled by existing precedent to rule in Robbins's favor on this claim at the time his conviction became final. *Caspari v. Bohlen*, 510 U.S. at 390; *Graham v. Collins*, 506 U.S. 461, 467-68 (1993). The Warden vigorously asserted this point below, and the Ninth Circuit simply ignored it. The panel's contrary holding relies on a rigid adherence to its own invalid interpretation of *Teague*'s "new rule" language.

Nor can it be successfully argued that this case comes within either of the two exceptions to the *Teague* bar. It has never even been suggested that the Ninth Circuit rule

should be applied retroactively because it decriminalizes a category of private conduct. *Lambrix v. Singletary*, 520 U.S. at 539. The second "exception is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the original proceeding." *Goeke v. Branch*, 514 U.S. at 120 (internal quotation marks omitted). Since a state has no obligation even to provide criminal defendants with appellate process, the procedural limits the state places on the right to appeal are not one of the small number of rules that can be described as "watershed." *Id.*

As this Court has made plain, a rule is new and therefore *Teague*-barred unless the *only* reasonable interpretation is that which the habeas petitioner seeks. *Lambrix v. Singletary*, 520 U.S. at 538. Under this articulation of the *Teague* standard, there can be no doubt that the proposed modification of *Wende* and *Feggans* is a new rule.

CONCLUSION

For the reasons outlined above, the Warden respectfully urges this Court to approve California's no-merit brief procedure as a constitutional interpretation of *Anders v. California*, to apply a *Strickland* test for prejudice to ineffective-assistance claims made against attorneys who file no-merit briefs, or to find, in the alternative, that any ruling which purported to upset California's long-established procedure on collateral review would be a new rule, in violation of *Teague v. Lane*.

Dated: April 22, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General

Carol F. Jorstad

*CAROL FREDERICK JORSTAD
Deputy Attorney General
*Counsel of Record

Counsel for Petitioner

CFJ:gr
LA1999US0001